Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

No. 91-2012

In The

Supreme Court of the United States

October Term, 1992

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia and ROBERT JOHNSON, individually and in his official capacity as Superintendent of Elections for Bleckley County, Georgia,

Petitioners,

v.

REV. E. K. HALL, SR., DAVID WALKER, U.S. DONALDSON, RICHARD HARRIS, WILLIE ATES, REV. WILSON C. ROBERSON, and NAACP Chapter of Cochran/Bleckley County,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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ARGUMENT

The sole issue in this case is whether governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. Respondents and their *amici* have failed entirely in their efforts to show that the selection of a particular size for a legislative body can cause the dilution of the voting power of minorities.

As long as a commissioner or a representative is elected from a single-member district, whether that individual is on a board of ten commissioners or is a sole commissioner, minority votes are not "diluted." Thus, while the election of the sole commissioner in Bleckley County may be subject to Section 2, the election of a single commissioner from a single-member district cannot be challenged *as dilutive* under Section 2.

I. WHERE ONE REPRESENTATIVE IS ELECTED TO ONE OFFICE FROM ONE GEOGRAPHIC AREA, MINORITY VOTES ARE NOT DILUTED UNDER SECTION 2.

Respondents acknowledge that the sole commissioner office is "fundamentally different" from a multi-member body. (Resp. Br. p.17). This is precisely the point. It is one thing to draw new single-member districts as a remedy for a violation of Section 2 caused by the use of an at-large election system. It is quite another to use the Act to *subdivide* existing single-member districts. There is no plausible basis for such an application of the Act,

particularly in the absence of a finding of an intent to discriminate.[1]

Indeed, the United States previously agreed that a single commissioner structure is not dilutive under Section 2, noting:

> "The practice of electing only one official to an office in a particular geographic region does not deprive any minority racial group of an equal opportunity to participate and elect 'on account of race or color'; under the single-member office structure of government, it is the group's small size, not its race, that prevents it from achieving a greater measure of electoral success. To be sure, the practice of electing only one official from a particular area may mean that minority groups – whether racial, religious, political, or socio-economic – will be unable to achieve electoral success, but that does not mean that they are being unfairly denied an equal opportunity to participate in the political process. It is inherent in the very nature of our majoritarian democratic political system that numerical minorities lose elections, and Section 2 was not intended to invalidate that democratic system. . . . Accordingly, the practice of utilizing a single-member office does not violate Section 2, because it does not result in the denial of equal

[1] While the Court of Appeals in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), found evidence of an intent to discriminate in the creation of the sole commissioner system in 1946, there has been no such determination in Bleckley County, and in fact a determination was made that there was no intent to discriminate in the creation of the sole commissioner. (Pet. App. 5-6, 10).

> political opportunity on account of race." (U.S. Br. on Pet. for Cert. pp.6-7).

Under a Section 2 analysis, courts must look to whether the existing structure, in this case the single-member district of Bleckley County, is subject to vote dilution analysis. It is not appropriate, and pre-supposes a violation of Section 2, to judge the existing system by any other plan or hypothetical model. In Bleckley County the only possible way to establish a Section 2 violation is to ignore the present system and to assume there is an expanded county government, and then to judge the county as if it were a multi-member system. Every case which has been addressed by the Court thus far has concerned multi-member systems. Bleckley County is unique in that it is, itself, a single-member district, and cannot be subject to challenge as dilutive under Section 2 without subdivision of that single-member district and expansion of the government.

The Court in *Gray v. Sanders*, 372 U.S. 368 (1963), stated:

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote - whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 379.

In Bleckley County the geographical unit is the county itself. All who live there, regardless of their sex, occupation, income or location of their home, have an

equal vote for their single representative. This is analogous to each person in the state of Georgia voting for one governor of Georgia, regardless of the voter's status, each person in the Eighth Congressional District of Georgia voting for the one congressman from that district, and each person in the United States voting for President. "[E]ach person's vote counts as much, insofar as practicable, as any other person's." *Hadley v. Junior College District*, 397 U.S. 50, 54 (1970). The sole commissioner is the representative of the single-member district of Bleckley County. In this scheme, numerical minorities lose elections, whether they be black or white, Asian or Indian, Republican or Democrat.

Respondents attempt to distinguish the sole commissioner position from other single-member offices, such as President of the United States or governor or sheriff, by examining the powers, duties and responsibilities of each office. This misses the point. The inquiry under Section 2 is not the authority of the office in question but whether the voters for that office have an "opportunity" to participate which is equal to all other voters. In *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), the court held that the 40% "near-majority" rule for the election of the mayor, city council president and comptroller, all single-member offices, could not violate Section 2. It reasoned that Section 2 addresses not the difficulty of a minority victory, or the success of a black candidate, but the participation of minority voters in the election. Since the single-member office was voted on by an electorate in a single-member district, comprised of the City of New York, all voters participated equally, regardless of the majority vote rule. The court in *Butts*

also rejected Respondents' argument that the governing authority can be subdivided in order to establish a violation of Section 2.[2]

Respondents are plainly wrong to contend that minority voters do not have an opportunity to elect any of the legislative or executive officials of Bleckley County as it is currently constituted. Minority voters elect *all* of the legislative and executive officials in the county by virtue of their one-fifth voting population. Respondents do not recognize or admit their influence in these elections. They attempt to establish a violation of Section 2 merely by showing they have not been elected to office in proportion to their numbers in the population, ignoring the proportional representation disclaimer of Section 2.

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[2] Respondents also complain that the county commissioner is nominated and elected by majority vote, implying that the majority vote requirement was enacted in order to maintain white political control. (Resp. Br. p. 5). The District Court found, however, that Bleckley County, prior to 1964, used both a run-off provision as well as plurality elections. Moreover, in 1964 there were fewer than 50 registered black voters in Bleckley County, and black voter registration did not increase significantly until later. As such, there was little incentive to dilute black influence in Bleckley County in 1964, even under Respondents' logic. Petitioners' evidence established that the majority vote requirement in 1964 was implemented primarily as a protection against the rising influence of the Republican party. (Tr. 613). Furthermore, the only black state legislator in 1964, Senator Leroy Johnson, voted in favor of the majority vote requirement. Bleckley County's representative in the legislature had died, and therefore Bleckley County did not vote one way or the other on the legislation. He had, however, previously voted against similar legislation introduced in 1963.

Respondents argue that the sole commissioner system is subject to challenge, citing *Houston Lawyers' Ass'n. v. Attorney General of Texas*, 111 S.Ct. 2376 (1991), for the proposition that elections for single-member offices are not excluded from Section 2. *Houston Lawyers'*, however, did not concern a single-member district scheme similar to Bleckley County's, but concerned the election of trial judges from multi-member districts. For example, in Harris County, Texas, 20% black, voters elected only three black judges out of 59. The range was from three judges to 59 judges, running in separately numbered positions. The question was whether judges were "representatives" under Section 2. The issue in *Houston Lawyers'* did not concern whether a single-member officeholder from a single-member district, such as a sole commissioner, was subject to challenge "as dilutive" under Section 2. Moreover, no county which had a single judge, regardless of its minority population, was challenged in *Houston Lawyers'*.

Of interest is the fact that the Court in *Houston Lawyers'* pointed out Section 2 covers executive offices also, such as prosecutors, sheriffs, state attorneys general and state treasurers. It follows that Respondents miss the mark when they argue that sole commissioners, because they perform legislative functions, are subject to challenge as dilutive, while executive officers are not. Presumably any officeholder elected in a multi-member scheme is subject to Section 2. On the other hand, a single-member district, such as Bleckley County, electing one official, cannot be subject to a *vote dilution* analysis by its very nature.

Respondents argue that treating the commissioner as a single-member office would have serious negative consequences for minority political participation. Respondents fear jurisdictions will be encouraged to abolish their legislative bodies elected from districts and consolidate all legislative and executive powers in the hands of a single individual. Respondents fail to recognize, however, that any change in the method of electing officials would be subject to pre-clearance by the Justice Department under the provisions of Section 5 of the Voting Rights Act. 42 U.S.C. § 1973(c). If such a change is, in fact, "retrogressive," it could be stopped.

The more important point is that the Voting Rights Act expresses no preference for a particular number of officeholders in a given jurisdiction. No preference is expressed because it is not at all clear that there is a meaningful improvement in the influence exercised by minority voters when they go from being, for example, one-fifth of a single district to being a majority in one of five districts.

Indeed, such a change could itself be "retrogressive." Assume, for instance, a five-member commission is created, with one district having a population of 65% black, and the other four a population of 10% black. The victor in the majority black district must have white crossover votes, thus having some responsibility to those voters. The candidates in the other four districts can win with no black votes, thus having no obligation to black voters. In this scenario, the black electorate has greatly reduced its influence by having a five-member commission instead of one.

The remedy of minority voters in Bleckley County is not federal court intervention, but political campaigning on a grass roots level, which Respondents admit has not been tried to date.

II. A PROPORTIONAL REPRESENTATION STANDARD VIOLATES THE COURT'S MANDATE IN *GINGLES*.

Respondents argue for proportional representation in the absence of the proof required by the Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles* the Court stated:

> "The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure." *Id.* at 50 n.17.

Allowing Respondents to prove their case using a structure other than the existing single-member district – that is, a five-member system – establishes proportional representation as the new standard. This is inconsistent with Section 2's express rejection of any proportional representation requirement.

Indeed, Respondents attempt to use lack of proportionality in precisely the way the 1982 Senate Report and the proviso of Section 2 seek to prevent. S. Rep. No. 417, 97th Cong. 1st Sess. (1982). Blacks comprise 22.4% of the 1990 population. Since there is already a single-member district plan in place, occupied by a white, Respondents demand the expansion of the commission to 5 members so that, if a black is elected, there will be proportional representation. Based on their experience with the five-member Bleckley County Board of Education, Respondents expect to have a black elected in one of the five districts. Respondents have not suggested, however, a three, four or seven person commission although commissions of that size are found in Georgia. None of these other sizes would come as close to producing proportionality as would a five-member commission.

Respondents do not give the Court any indication as to an appropriate stopping point when subdividing single-member districts to insure proportional representation. The reason is that Respondents would have the court look not to the "opportunity" but to the degree of representation of minority voters. An affirmative action standard is thus suggested for Section 2.

Since there are county boards in Georgia that range from one county commissioner to a ten-person commission, the proportional representation or affirmative action standard set forth by Respondents would authorize the courts to assume jurisdiction over other counties and expand local county government. For instance, Bartow County, Georgia has a population of 55,911 people. Of these 8.9% are black. By expanding the county government from a sole commissioner to a ten-member board, a

court could assure that minority voters are proportionately (and presumably properly) represented. Chattooga County, Georgia has 22,242 residents, of whom 8.7% are black. Respondents' new Section 2 standard would not ask whether minority voters in Chattooga County have an opportunity to participate and to elect a representative of their choice, but whether there is a minority candidate on the commission. Since there is only one commissioner in Chattooga County, Respondents would argue that the existing structure is dilutive and that by considering black voting strength in a restructured form of ten county commissioners, a violation of Section 2 is shown. On the other hand, Stewart County, Georgia has a sole commissioner, but is 63.2% black. No argument has been made in Stewart County that the sole commissioner system violates Section 2, presumably because blacks in that county do not constitute a numerical minority. *See* 1990 Census of Population, Georgia, U.S. Department of Commerce, issued June 1992.

The court of appeals herein determined that a challenged practice of electing too few officials to an office can be responsible for minority vote dilution. This is not the test required by the Court in *Gingles, supra*. Even earlier than *Gingles*, the court of appeals in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) noted: "Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." *Id.* at 1305.

Using the reasoning of Respondents and the court below assures that no minority will ever fail on the issue of compactness, because any division or further subdivision of the challenged mechanism can be drawn to insure

a majority black district in proportion to its population. As such, governing bodies will find themselves on the slippery slope to proportional representation, subdividing existing single-member districts and expanding commissions from one commissioner to ten commissioners, or from four to ten, or six to ten.

Indeed, arguably, under the decision of the court of appeals, a minority which composes only 22% of the population within an existing single-member district could claim that it suffers vote dilution if no member of the group has ever run, and consequently has never been elected, and if in at least one election for some other office, such as a presidential primary, members of the minority group preferred a candidate other than the one preferred by the majority group. Assume a population of Hispanics comprising 22% of a single-member district, but making up less than 1% of the population of four other single-member districts in a jurisdiction. Under the argument of Respondents and the reasoning of the court of appeals, the district with 22% Hispanics should be subdivided into five units, so that Hispanics could be a majority in one newly created district. The governing body would now be enlarged fivefold, to 25. Such has happened in Bleckley County. This is the crux of Respondents' argument.

Respondents contend the Voting Rights Act guarantees election of minority candidates, stating: "No black has ever been elected to a county office at-large, and given the existing polarization in the county it is unlikely that one ever will." (Resp. Br. p.18). The Court, however, has squarely rejected such a contention in *Chisom v. Roemer*, 115 L.Ed. 2d 348 (1991), by holding:

> "As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights." *Id.* at 364.

As such, it is not enough merely to prove that a candidate of minority voters has never been elected, but Respondents must also prove that minority voters have less opportunity to participate. Protection of minority voters cannot be bifurcated into two claims, participation or election. *Both* must be proven. Respondents have not demonstrated a lack of participation or an unequal opportunity to participate.[3] Furthermore, while black voters complain that they have not elected any black candidate county-wide, Respondents also have not proven that the present commissioner or any commissioner has not been the candidate of choice of minority voters.[4]

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[3] Indeed, the voter registration statistics show full participation by black voters. Black voters are registered at the rate of 70% of the voting age population, which is equal to registration figures for white voters.

[4] Respondents also do not explain why, if Bleckley County voters are so racially polarized, the county, with white support, agreed in 1984 to a system of districts for election to the school board, with a majority black district. (Pet. App. 10, 25-26; Tr. 157). The fact that Bleckley voters chose to elect their school board from five districts also indicates that the decision to retain the sole commissioner in the 1986 referendum was not racially motivated. If the rejection of the change in the 1986 referendum was racist, as Respondents contend, then this same racism

The opportunity to participate is not separate from the opportunity to elect under the provisions of Section 2(b). *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). While Respondents argue that this reading of Section 2 will result in minority voters having no protection of their right to participate because they will always lack the numbers necessary to elect black candidates, as noted by the court in *Chisom v. Roemer*, this argument "rests on the erroneous assumption that a small group of voters can never influence the outcome of an election." *Chisom v. Roemer*, 115 L.Ed. 2d 348, 364 n.24. The single-member officeholder elected from the single-member district, Bleckley County, is vitally dependent upon minority support for election.

Moreover, the Court in *Gingles* precluded some small and unconcentrated minority groups from attempting to rectify vote dilution even though they have less opportunity than others in the electorate to participate and to elect. These groups "may nonetheless 'possess the potential' to elect candidates of their choice in a single-member district with the help of a sizeable and long-standing white crossover vote." *McNeil v. Springfield Park District*, 851 F.2d 937, 942 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

The court in *McNeil* also recognized the danger of undue expansion, stating: "Adding seats to the boards would create a voting rights violation where none presently exists by enabling appellants to meet the necessary

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should have led to the rejection of the five single-member districts for the board of education two years earlier.

precondition of their Section 2 claim. This is a sort of bootstrapping we cannot accept." *Id.* at 946. Thus, the election of the sole commissioner from the single-member district of Bleckley County should be assessed, not in the vacuum of proportional representation, but in its full context.

III. BLECKLEY COUNTY MUST BE JUDGED AS IT PRESENTLY EXISTS, NOT BY AN ARBITRARY STANDARD.

Respondents also argue that a five-member board of commissioners is the predominant configuration for county governing authorities in Georgia, and thus it is an appropriate "benchmark" by which Bleckley County may be judged. This is another way of arguing that proportional representation should be mandated. However, instead of "benchmarking," Respondents are "bootstrapping."

Using the size of other county commissions or even the most popular size in a state or a political structure is nothing more than arbitrary and convenient. Using such a standard may in fact lead to unwanted and dangerous consequences.

The Lawyers' Committee for Civil Rights Under Law, as amicus curiae, argues that the use of a five-member commission in Georgia is a "common practice" and thus not objectionable. (L.C. Br. p. 14). Questions then arise as to what determines a common practice, how widespread must a phenomenon be to be considered a common practice and whether only the modal structure can be considered a common practice. The Lawyers' Committee does

not consider that there can be multiple common practices within a state.

While a five-member commission may be the modal size of Georgia commissions, it is certainly not the only size. The largest governing bodies at the county level in Georgia have ten person commissions. The smallest have one. *See* State of Georgia, 1991 OFFICIAL DIRECTORY OF UNITED STATES CONGRESSMEN, STATE AND COUNTY OFFICERS (Atlanta: Office of Secretary of State, 1991.) Both of these are authorized by O.C.G.A. § 1-3-3(7) which defines "county governing authority" as "the board of county commissioners, the sole county commissioner, or the governing authority of a consolidated government."

Commissions with three or seven members are also common practices in Georgia. In 1991, the sole commissioner form was the third most common format in Georgia. There were 90 counties with five-member commissions, 22 with three-member commissions and 20 with a sole commissioner. There are only two counties with a ten member governing body compared with 14 sole commissioners in 1993, so that, under the Lawyers' Committee argument, a ten-member body would not qualify as a common practice. State of Georgia, 1991 OFFICIAL DIRECTORY, *supra*. Argument could thus be made that the governing bodies of both Clarke County and Muscogee County, Georgia should be reduced to fit the procrustean bed of common practice.

The United States argues in its brief supporting Respondents that a court would not order the expansion of a commission to 25 or 50 members because "that

numerous a county governing body would be largely, if not entirely, unprecedented in this country." (U.S. Br. p.18). But the Chicago city council has 50 members, New York City has almost that many, St. Louis, which has fewer than 400,000 people, has almost 30 city councilmen. The city of Atlanta has 18. *See* U. S. Commission on Civil Rights, POLITICAL PARTICIPATION (Washington, D.C.: Government Printing Office, 1968). Clearly, if national "precedent" is enough to justify an expansion of this magnitude, such precedent does exist.

Amici also attach significance to the fact that Bleckley County has five districts from which school board members are elected. (U.S. Br. p.20; L.C. Br. p.14). The implication is that there should be, or typically are, the same number of districts in a county commission and a board of education. However, the most common pattern in Georgia in 1991 was a board of education larger than the county commission. This pattern occurred in 64 counties. In 62 counties the number of commissioners equalled the number of school board members. In ten counties the commission was larger than the school board. In 23 counties the commission was elected, but the school board was appointed. If one considers the number of commissioners and board of education members elected from districts in 1991, 23 counties had more commissioners than school board members elected from districts. In 60 counties, the two bodies had equal numbers of members elected from districts and in 53 counties more school board than commission members came from districts. See State of Georgia, 1991 OFFICIAL DIRECTORY, *supra*. Furthermore, the Solicitor General's use of the board of education as a model for Bleckley County suggests if the

school board were appointed, the commission should be chosen in the same way.

The Solicitor General also argues that expanding the commission to five would not be a problem since that is often the size of Georgia commissions. (U.S. Br. p.20). By analogy, however, the Texas Senate, with its 31 members, is one of the small state senates. Thus, under his argument, the Texas Senate could be forced to expand to the modal size for a state senate so that some additional minority seats can be created.

It can thus be seen that trying to establish a "common practice" or trying to find a "benchmark" by which to judge the challenged structure is unwise. This is precisely why the courts have cautioned against judging vote dilution against some hypothetical model rather than the number of positions in the existing governmental body. *See Overton v. City of Austin*, 871 F.2d 529 at 543 (5th Cir. 1989), Hon. Edith H. Jones, concurring.

The Voting Rights Act should provide remedial assistance for governmental wrongs. It should not impose affirmative duties on the state and local governments to enhance minority political power. The district court herein recognized this, noting:

> "There appears to be widespread local disagreement over the respective merits and shortcomings of the alternative systems given the size and revenue base of Bleckley County. After considering all the relevant evidence, it appears that what remains before the court is simply a whole community's disagreement over their preferred form of local government. This court does not have the authority to resolve such

> purely political disputes. The court's powers extend only the resolution of disputes involving a violation of the Constitution, the Voting Rights Act or some other law." (Pet. App. 59).

The district court was echoing the sentiments of Judge Eisele who stated in *Jeffers v. Clinton*, 730 F.Supp. 196 (E.D. Ark. 1989): "It might be said that blacks in *every* jurisdiction benefit from having their own in office. However, that is an argument not for federal intervention but for black political organization." *Id.* at 279.

IV. CONSTITUTIONALITY IS NOT AN ISSUE.

Respondents argue that the at-large elected commissioner is unconstitutional. This issue, however, is not before the Court. Respondents did not seek review in this Court of the disposition of the constitutional claims. *See Chisom v. Roemer*, 115 L.Ed.2d 348 at 360.

Notwithstanding, the district court found no evidence of any racial animus in the creation or maintenance of the sole commissioner system. In fact, plaintiffs' expert, Dr. Peyton McCrary, testified that in his research pertaining to the years 1946 to 1964 he found no articulation of a racial purpose for the maintenance of the sole commissioner form in Bleckley County. (App. 24). Most recently, the question of the sole commissioner appeared in the 1986 referendum to determine whether to change the county government to a six member board. In considering this the district court noted:

> "The underwhelming response of Bleckley County voters to the referendum coupled with the lack of evidence from either plaintiffs or

> defendants to demonstrate that race played even a minor role in the referendum campaign indicates a general perception in the community that the referendum results were the product, not of racial motivations, but of a generally held perception favoring a vote against expanding the size of the government: a sentiment which knows no racial barriers. This Court has heard no credible evidence to support plaintiffs' arguments that the referendum itself evidences the alleged discriminatory purpose to maintain the county commission in its present form." (Pet. App. 26-27).

Moreover, the Equal Protection Clause of the Fourteenth Amendment requires that each person's vote count as much as any other person's insofar as practical. *Chisom v. Roemer*, 115 L.Ed.2d at 368 n.31, citing *Hadley v. Junior College District*, 397 U.S. 50 (1970). In the geographic unit for which the representative is to be chosen, that is, the single-member district of Bleckley County, all who participate in the election have an equal vote. This certainly meets the requirement of the Fourteenth Amendment.

While Respondents also complain that the majority vote requirement used in Georgia to govern primary elections is unconstitutional, this issue was not presented in the district court nor the court of appeals, and the district court noted there was no evidence presented at trial to suggest that Bleckley County exercised any control over the implementation of the majority vote requirement. (Pet. App. 27).

The district court recognized the paucity of the evidence concerning the constitutional issues:

"While the facts that racism and segregation are part of the history of the South and the nation, and that these are problems yet subject to full redress nationwide, are not matters subject to quibbling, this court cannot, based simply upon the existence of racial tensions in this county, charge every piece of legislation and every political process carried out with being specifically tainted by discriminatory intent. Plaintiffs in the case *sub judice* have failed to provide any evidence that Bleckley County's single member county commission is the product of original or continued racial animus or discriminatory intent." (Pet. App. 27-28).

CONCLUSION

For the reasons set forth above, the decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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